

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

In the Matter of)
Ms. Blanche Field)
and)
The City of Boston)

Case No. 77-CETA-102

This case is before the Secretary again on remand from the United States Court of Appeals for the First Circuit. In its decision of September 23, 1980, (631 F.2d 156), the First Circuit affirmed the Secretary's decision of July 11, 1979, holding that Ms. Field was a CETA participant (631 F.2d 156, 159) and that CETA regulations, which require certain procedures to be followed when taking adverse action against a participant, were violated when her employment was terminated (631 F.2d 156, 159-160).

I have been directed by the Court on remand, however, to reconsider the decision to award back pay for the entire period of time from Ms. Field's dismissal to the date of the hearing held on her complaint by the City of Boston. I hold, for the reasons set forth below, that Ms. Field is not entitled to back pay because the procedural violation here was harmless error which did not seriously affect the fairness of the procedures used in terminating her, and because her termination was ultimately found to be substantively justified.

FACTS

Ms. Field began work as a CETA public service employment (PSE) employee of the City of Boston (Boston) on February 19, 1975. She underwent a physical examination the next day and was told by the doctor that he had rejected her for employment with the City of Boston. She was not allowed to return to work and was not given any written explanation of why she was terminated or what procedures she could invoke to contest her dismissal. Ms. Field filed a complaint with the Mayor's Office of Human Rights in March 1975 which referred it to the Massachusetts Commission Against Discrimination (MCAD). MCAD issued a written ruling finding no probable cause to support Ms. Field's complaint on November 20, 1975. Ms. Field filed another complaint with the City of Boston CETA office on December 1, 1975, which held a hearing on March 3, 1976, and dismissed the complaint in a written decision of March 16, 1976. Ms. Field filed a complaint with the Department of Labor Employment and Training Administration on March 30, 1976. After an investigation and a hearing before an Administrative Law Judge, the ALJ found that Ms. Field's termination was in violation of the procedural requirements of the CETA regulations (29 CFR 95.37 (1974)) and, on July 29, 1977, ordered that Ms. Field be reinstated and paid back pay from the date of termination until March 3, 1976, when the CETA procedural requirements were

satisfied. The City of Boston appealed that decision to the Secretary who reversed the ALJ's order of reinstatement but upheld the award of back pay on July 11, 1979. Boston then sought review in the Court of Appeals.

DISCUSSION

The only issues presented on remand are whether Ms. Field is entitled to back pay for the procedural violations which took place here, and, if so, for what period of time. We have been directed by the Court of Appeals to explain how the principle of back pay as a make whole remedy applies to the facts of this case, and to consider, among other things, that the procedural violation was remedied in March 1976; the possibly justified confusion on the part of the City as to the applicable regulations; and the delay in filing a complaint with the City CETA office perhaps contributed to in part by advice from the Department of Labor. (631 F.2d 156, 161.)

The purpose of back pay, of course, is to make an employee whole for any loss of earnings actually suffered. Here, Ms. Field's termination was ultimately found to have been justified, and that conclusion was not challenged at the federal level. It is conceded that Ms. Field was given oral notice by the City

doctor that she did not pass the physical exam and would be rejected **for** employment. Thus, the question presented by this case is whether failure to provide written notice in these circumstances prior to termination constitutes such a serious violation of CETA procedures that it undermines the fairness of the entire process to the extent that it should be considered void. I do not interpret the CETA regulations to require that result in these **circumstances.**^{*/}

Under the doctrine of "harmless error", courts have drawn a distinction between serious errors which undermine the fairness of the procedures, and formalities which would not be expected to affect the outcome. Thus, in Doyle v. U.S., 599 F.2d 984 (Ct. Cl. 1979), former officers in the Army Reserve sued for reinstatement and back pay after they were released from active duty because they were passed over twice for promotion. (Department of the Army regulations imposed this "up or out" rule.) They asserted, among other things, that there were procedural irregularities in the promotion process, namely, that the promotion boards which had twice passed them over did not include reserve officers, as required by statute. New, properly constituted promotion boards were later established which also passed plaintiffs over. The Court of Claims held that the reservists were entitled to back pay for the period from their original separation until the later

^{*/} My recent decision in the Matter of Allen Gioielli, 79-CETA-148, should be distinguished from this case because there the complainant received no explanation of the reasons for his termination until he received a letter from the Town Council President.

decision of the properly constituted board. The court **"underscored"** the point the **"the** Army's error . . . was not merely technical, formal or trivial, but serious, substantial and directly related to the purpose and functioning of selection boards." 599 **F.2d** at 994. Inclusion of reservists, the court said, minimizes the chance of bias against them on the part of regular Army personnel. Several other harmless error cases cited by the government were distinguished because they involved substantive, rather than procedural, errors which had no effect on the outcome of the case. "The error in this case," the court said, "is not a violation of plaintiffs' substantive rights but rather a violation of plaintiffs' rights to fair procedure or **process...[F]ederal** employees...are entitled to such procedure that has been...provided [by Congress or agency rules.]" The harmless error rule is not applicable when the error is **"so inimical to judicial or fair process that their violation cannot be tolerated under any circumstances."** 599 **F.2d** at 995. Since the error in Doyle was a clear statutory violation which could have led to prejudice against reservists, the entire process prior to the action of the reconstituted promotion board must be considered void. 599 U.S. at 996. Ryder v. U.S., 585 **F.2d** 482, 488-489 (Ct. Cl. 1978).

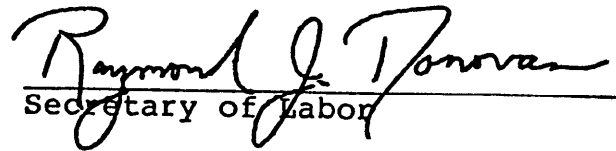
In this case, the only violation **committed** by Boston was failure to give Ms. Field written notice of the adverse action. She

had an opportunity to respond by presenting a letter from her own doctor, and, as I held in Gioielli, supra (see footnote p. 4), a recipient is not required to hold a hearing prior to termination. Since she was given notice by Dr. Blackburn that he was rejecting her for employment because of the large mass in her neck, I do not view the failure of Dr. Blackburn or the City of Boston to put that conclusion in writing and deliver it to Ms. Field as a "serious, substantial" error which goes to the heart of the fairness of the whole administrative process. See Doyle v. U.S. and Ryder v. U.S., supra. It was no more than harmless error and Ms. Field should not receive the windfall of back pay when her termination was ultimately upheld.

I would note that recipients should not interpret this decision as giving them license to treat the procedural requirements of CETA lightly. The Department of Labor has the authority to investigate any violation of the Act or regulations (20 CFR 676.86(e)) and to take appropriate action, including the ordering of remedies and imposition of sanctions. (20 CFR 676.91(c).) Procedural protections for CETA participants serve important purposes of

-7-

the Act, and should be adhered to by all recipients.

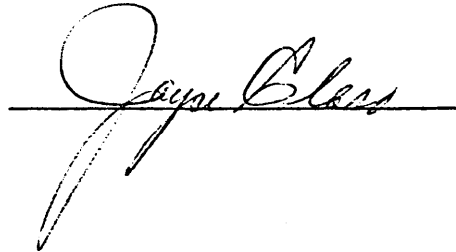

Secretary of Labor

Dated: SEP 29 1982
Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Blanche Field v. City of Boston
Case No.: 77-CETA-10 2
Document: Decision of the Secretary of Labor

Copies of the above-referenced document were mailed to the persons listed below on October 1, 1982, 1982.



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